

STATE OF MICHIGAN  
COURT OF APPEALS

---

UNPUBLISHED

June 20, 2013

In the Matter of BERRY, Minors.

No. 313428

Genesee Circuit Court

Family Division

LC No. 07-123021-NA

---

Before: WHITBECK, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(i) (parent's act caused injury or abuse to child or a sibling of the child), (b)(ii) (parent failed to prevent injury or abuse to child or a sibling of the child), (c)(ii) (other conditions supporting jurisdiction have not been rectified), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood of harm if children are returned to parent). Because respondent's claim that he was not provided specialized services to accommodate his cognitive limitations lacks merit and respondent was not denied the effective assistance of counsel, we affirm.

The trial court assumed jurisdiction over the minor children based on the plea of their mother. More than one year later, the court authorized a petition seeking termination of respondent's parental rights. The petition alleged that respondent had a Children's Protective Services history dating back to 2002 and had failed to benefit from services offered during the instant proceeding. Following a termination hearing, the court entered an order terminating respondent's parental rights. This appeal followed.

Respondent does not challenge the statutory bases on which the trial court relied in terminating his parental rights or argue that termination was not in the children's best interests. Rather, he argues that petitioner violated the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.*, by failing to provide him with specialized services to accommodate his cognitive limitations.

The time for raising a claim that specialized services are required is when the trial court adopts the case service plan or soon thereafter, not at the termination hearing. *In re Terry*, 240 Mich App 14, 26-27; 610 NW2d 563 (2000). Because respondent failed to raise this issue in a timely manner, it is not properly preserved for appellate review. See *LME v ARS*, 261 Mich App 273, 285; 680 NW2d 902 (2004). We review unpreserved issues for plain error affecting substantial rights. *In re HRC*, 286 Mich App 444, 450; 781 NW2d 105 (2009).

In *Terry*, 240 Mich App at 25, this Court held that disabled parents may not raise violations of the ADA as a defense to termination of parental rights proceedings because the proceedings do not constitute “services, programs or activities” within the meaning of the ADA. This Court explained, however, that the ADA requires the Department of Human Services (DHS) “to make reasonable accommodations for those individuals with disabilities so that all persons may receive the benefits of public programs and services.” *Id.* Accordingly, petitioner’s reunification services and programs are required to comply with the ADA. This Court further noted that “the state legislative requirement that the [DHS, formerly FIA] make reasonable efforts to reunite a family is consistent with the ADA’s directive that disabilities be reasonably accommodated.” *Id.* at 26. “In other words, if the [DHS] fails to take into account the parents’ limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family.” *Id.*

Respondent argues that petitioner was required to provide him with specialized services once it discovered that he was cognitively impaired. By the time of the August 2012 psychological evaluation that revealed the impairment, however, the goal had changed from reunification to termination of respondent’s parental rights. The DHS is not required to provide reunification services when the goal is termination. *In re HRC*, 286 Mich App at 463. Moreover, there is no indication in the record that petitioner was on notice, either actual or constructive, of respondent’s cognitive limitations before he completed the psychological evaluation.

In any event, the record establishes that respondent had the assistance of a variety of services to help him with his parenting skills. Caseworkers attended visitations to help respondent, and a caseworker met individually with respondent to give him concrete examples regarding parenting techniques. There is no indication that additional, more specialized services were available that were not offered to respondent. Accordingly, respondent has failed to establish plain error affecting his substantial rights.

We also reject respondent’s claim that he was denied the effective assistance of counsel because of counsel’s failure to raise the issue concerning specialized services in a timely fashion. To prevail on an ineffective assistance of counsel claim, a respondent must show that counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced him that it denied him a fair trial. *In re CR*, 250 Mich App 185, 198; 646 NW2d 506 (2001). To establish prejudice, a respondent must show that there exists a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Id.* Our review of unpreserved claims of ineffective assistance of counsel is limited to errors apparent on the record. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011).

The record does not support respondent’s ineffective assistance of counsel claim. The record suggests that respondent’s attorney was unaware of respondent’s cognitive limitations before he completed the psychological evaluation, and nothing in the record indicates that she should have had either actual or constructive knowledge of such limitations. Moreover, as previously discussed, respondent was offered several forms of assistance, and the record does not reveal that other services were available that could have been provided to respondent. As such,

respondent has failed to establish that he was denied the effective assistance of counsel.

Affirmed.

/s/ William C. Whitbeck

/s/ Patrick M. Meter

/s/ Pat M. Donofrio